

**THE TEXAS CITIZENS PARTICIPATION
ACT: A SAFE HAVEN FOR MEDIA
DEFENDANTS AND BIG BUSINESS, AND A
SLAPP IN THE FACE FOR PLAINTIFFS
WITH LEGITIMATE CAUSES OF ACTION**

Comment

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I. THE TEXAS CITIZENS PARTICIPATION ACT: A BRIEF OVERVIEW

The Texas Legislature passed the Texas Citizens Participation Act (TCPA) in 2011 with the goal of protecting the rights of citizens to exercise their right of free speech, right to petition, and right of association.¹ It provides a mechanism by which a defendant may dismiss an action early on in the litigation process—even earlier than the summary judgment stage.² The idea is that early dismissal will prevent defendants from being inundated with litigation costs by plaintiffs with impure motives.³

This Comment will first analyze “SLAPP” suits and how they came to be recognized.⁴ Second, it will look to the background and history of anti-SLAPP legislation in order to provide a lens by which the TCPA can be properly examined.⁵ This Comment will pay special attention to California’s anti-SLAPP statute because of its striking similarities to the TCPA.⁶ Third, this Comment will focus on the specific provisions of the TCPA and will look at how SLAPP suits have been resolved in Texas courts so far.⁷ Fourth, it will identify problems contained in the statute and predict the future of SLAPP litigation in Texas.⁸ Finally, this Comment will provide recommendations for the Texas Legislature that would curb abuse and clear up statutory ambiguities.⁹

II. WHAT IS A “SLAPP”?

The TCPA represents what is commonly called an anti-SLAPP statute.¹⁰ SLAPP is an acronym that stands for “Strategic Lawsuit Against Public Participation.”¹¹ Typically, SLAPP suits are filed by large businesses and other deep-pocketed entities to silence criticism aimed at them by average citizens.¹² Some of the more common SLAPP claims include, but are not limited to, “defamation, tortious interference with

1. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West Supp. 2014).

2. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West Supp. 2014).

3. See *infra* note 14 and accompanying text.

4. See *infra* Part II.

5. See *infra* Parts II–V.

6. See *infra* Part III.

7. See *infra* Part VI.

8. See *infra* Parts VII–VIII.

9. See *infra* Part IX.

10. See generally Pete Reid, *Memorandum on the Texas Citizens Participation Act (The Texas Anti-SLAPP Statute)*, PETE REID L. PLLC (Sept. 7, 2012), <http://petereidlaw.com/2012/09/memorandum-on-the-texas-citizens-participation-act-the-texas-anti-slapp-statute/> (identifying the TCPA as an anti-SLAPP statute).

11. Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 802 (2000).

12. Leiza Dolghih, *Freedom of Speech v. Defamation: The Texas Citizens Participation Act*, N. TEX. LEGAL NEWS (May 6, 2013), <http://northtexaslegalnews.com/2013/05/06/freedom-of-speech-v-defamation-the-texas-citizens-participation-act1>.

business relationships, abuse of process, conspiracy, civil rights violations, and other violations of law such as nuisance.”¹³ The goal of SLAPP filers is not to prevail in court; rather, the intent is to bury the other side in litigation costs to the point that it becomes too financially burdensome to combat the legal action.¹⁴ Thus, the true effect of SLAPPs is difficult to ascertain because there is no quantifiable way to measure the chilling effect they have on the public.¹⁵

A. Envisioning a SLAPP: A Helpful Hypothetical

To understand the typical elements of a SLAPP, it is helpful to envision a hypothetical. Suppose a professional sports team wishes to build a stadium in a residential area, displacing a large number of citizens in the community. The citizens begin to protest the construction of the stadium by petitioning the local government, protesting on the streets, and writing letters to the editor in the local newspaper. In the face of such criticism, the sports organization files a suit against the group as a whole and its individual members alleging defamation. The organization crafts its pleadings so that it survives an initial Rule 12 motion to dismiss, initiating an intensive—and very expensive—discovery and litigation process. The individuals divert their attention from their protest efforts to defend their case, and after years of litigation, the protestors end up winning on summary judgment or at trial. By this point, however, the group is deterred from protesting further because of the costly litigation process. Other groups and individual citizens are also deterred from public participation because they saw the toll that the process took on the original protestors. Meanwhile, the sports organization—even though it “lost” in court—is still financially sound and has effectively deterred everyone else from protesting its efforts to construct the stadium. This hypothetical exemplifies the paradigmatic David versus Goliath SLAPP.¹⁶

B. SLAPPs Identified: The Pring/Canan Study

Before anti-SLAPP legislation, there were no judicial safeguards to effectively combat SLAPPs.¹⁷ The safeguards that were in place focused on preventing plaintiffs with meritless claims from winning in court.¹⁸ Although SLAPPs by definition are meritless, the goal of a SLAPP plaintiff

13. Barbara Arco, Comment, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587, 590 (1998).

14. Dolghih, *supra* note 12.

15. See Arco, *supra* note 13, at 591.

16. See John G. Osborn & Jeffrey A. Thaler, *Maine’s Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 ME. B.J. 32, 32–33 (2008).

17. Tate, *supra* note 11, at 805.

18. *Id.*

is not to win, but rather to delay and harass.¹⁹ The expenses associated with bringing a SLAPP are seen merely as “the cost of doing business.”²⁰ Thus, before anti-SLAPP legislation, there were no effective deterrents from bringing a meritless suit that could easily be written off as just another business expense.²¹

SLAPPs finally began receiving public attention after the conclusion of a study conducted in the late 1980s by George W. Pring and Penelope Canan, professors at the University of Denver.²² Pring and Canan analyzed over 240 different cases and discovered that SLAPPs were becoming more popular and were having a deleterious effect on public participation in government.²³ Pring and Canan were actually the ones to coin the term Strategic Lawsuit Against Public Participation.²⁴ Pring and Canan explained that SLAPPs generally proceed through three stages: first, individuals speak out to the government or to the voters about a public issue; second, opponents of the individuals retaliate by filing tort claims such as defamation or nuisance; and third, the case is ruled upon.²⁵ In the cases Pring and Canan analyzed, they found that SLAPP plaintiffs sought a wide range of damages.²⁶ Some plaintiffs sought as little as \$10,000, while others sought as much as \$100 million.²⁷ The average SLAPP plaintiff sought a staggering \$7.4 million in damages.²⁸ Pring and Canan recognized that as these suits become more common, they could have a “ripple effect,” deterring individuals from protesting or speaking out against the government out of fear of being sued for a large sum.²⁹

The solution to this problem, according to Pring and Canan, was to invoke the First Amendment right to petition in these types of cases.³⁰ This would keep debates about public issues in their proper place—the public—rather than removing them to the courtroom and litigating the issues.³¹

19. *Id.*

20. *Id.*

21. *Id.*

22. Tom Wyrwich, Comment, *A Cure for a “Public Concern”*: Washington’s New Anti-SLAPP Law, 86 WASH. L. REV. 663, 666 (2011).

23. *Id.*

24. *Id.*

25. Jonathan Segal, *Anti-SLAPP Law Make Benefit for Glorious Entertainment Industry of America: Borat, Reality Bites, and the Construction of an Anti-SLAPP Fence Around the First Amendment*, 26 CARDOZO ARTS & ENT. L.J. 639, 644 (2009).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* (quoting Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 515 (1988)) (internal quotation marks omitted).

30. *Id.* at 645.

31. *See id.* at 644–45.

Researchers had no idea that states would enact statutory provisions in order to curb the very problem they diagnosed.³²

Although SLAPPs are a relatively new phenomenon—only having received attention in the last thirty years or so—their origins can be traced all the way back to the earliest years of America’s existence.³³ These cases arose during the time of the American Revolution, when citizens were attempting to remove corrupt officials from public office.³⁴ The first case that Pring and Canan recognized as a SLAPP, *Harris v. Huntington*, took place in Vermont in 1802.³⁵ In that case, five citizens petitioned the local government to prevent the reelection of their Justice of the Peace, Ebenezer Harris.³⁶ In response, Harris filed a libel suit against the individual defendants.³⁷ The Supreme Court of Vermont ruled in favor of the defendants, recognizing their petitioning as a protected form of expression under the First Amendment.³⁸ Although there were other SLAPPs during this early period in American history, these suits largely disappeared until the 1960s and 1970s, when political activism was at an all-time high.³⁹

C. Legislative Construction: Varying Levels of Protection

All state anti-SLAPP statutes are similar to a certain degree; each generally provides a means by which defendants may dispose of a case before entering into the expensive processes of discovery and litigation.⁴⁰ The level of protection afforded to defendants, however, varies from state to state.⁴¹ Some statutes specifically define which type of individuals may invoke the statute and which type of expression the statute protects.⁴²

Generally, a state’s anti-SLAPP statute falls into one of three categories: narrow, moderate, or broad.⁴³ For example, one state might have an anti-SLAPP statute that only allows certain individuals to invoke the statute.⁴⁴ It may preclude large companies from utilizing it, recognizing that large companies typically have the financial wherewithal to combat a

32. See *id.* at 645. Pring and Canan believed that the First Amendment right to petition alone would be a sufficient defense to these SLAPP-type situations. See *id.* at 645.

33. Jeremiah A. Ho, *I’ll Huff and I’ll Puff—But Then You’ll Blow My Case Away: Dealing with Dismissed and Bad-Faith Defendants Under California’s Anti-SLAPP Statute*, 30 WHITTIER L. REV. 533, 542 (2009).

34. *Id.*

35. *Id.*; *Harris v. Huntington*, 2 Tyl. 129, 129 (Vt. 1802).

36. *Harris*, 2 Tyl. at 129; Ho, *supra* note 33, at 542.

37. *Harris*, 2 Tyl. at 129; Ho, *supra* note 33, at 542.

38. Ho, *supra* note 33, at 542–43.

39. See *id.* at 542.

40. See London Wright-Pegs, Comment, *The Media SLAPP Back: An Analysis of California’s Anti-SLAPP Statute and the Media Defendant*, 16 UCLA ENT. L. REV. 323, 329 (2009).

41. *Id.*

42. *Id.*

43. *Id.* at 332.

44. See *id.* at 332–33.

potentially frivolous claim in court.⁴⁵ Also, some states have statutes that only protect the First Amendment right to petition, whereas others have statutes that protect the right to petition along with the First Amendment right to free speech.⁴⁶

D. First State's Reaction to the Pring/Canan Study

Due in part to the publicity that SLAPPs were receiving following the Pring/Canan study and in part to a shocking case embodying the most egregious aspects of the paradigmatic SLAPP, the State of Washington passed the nation's first ever anti-SLAPP law in 1989.⁴⁷ The bill was called the "Brenda Hill Bill," after Brenda Hill, who reported her employer to the government after she learned that it owed a significant amount—hundreds of thousands of dollars—in unpaid taxes.⁴⁸ After Hill reported her employer, it sued her and buried her in litigation costs until she was ultimately forced to file for bankruptcy.⁴⁹ Recognizing the need to protect citizens from these types of suits, the Washington State Legislature introduced the Brenda Hill Bill, which provided that citizens would be immune from "civil liability for claims based on good-faith communication with the government regarding any matter 'reasonably of concern.'"⁵⁰ Although certainly a step in the right direction, the Brenda Hill Bill was not without its flaws.⁵¹ Its greatest flaw was that it failed to provide a mechanism by which SLAPPs could be dismissed early in the litigation process without having to drag the defendant through a messy discovery period.⁵² The good-faith requirement also presented a problem because what constitutes a good-faith communication often involves extensive factual determinations that require an expensive discovery process.⁵³

45. *See id.* at 333. Some statutes are drafted so narrowly that they only provide protection in the context of direct communication with public officials. *Id.*

46. *See* Wyrwich, *supra* note 22, at 664. States that have extended their anti-SLAPP statutes beyond solely the right to petition to incorporate freedom of expression as well include: California, Washington, Arkansas, Illinois, Indiana, Louisiana, Maryland, Oklahoma, Oregon, Rhode Island, and Vermont. *See id.*

47. Osborn & Thaler, *supra* note 16, at 33.

48. Wyrwich, *supra* note 22, at 669.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 666.

53. *Id.* at 669–70.

III. THE CALIFORNIA ANTI-SLAPP STATUTE: FROM NARROW ORIGINS TO BROAD APPLICATIONS

Several more states followed Washington's example and passed their own anti-SLAPP laws.⁵⁴ California passed its anti-SLAPP bill (the Lockyer Bill) in 1992, offering unprecedented protection for defendants in SLAPP suits.⁵⁵ This Comment will devote special attention to examining California's anti-SLAPP statute because it is strikingly similar to the TCPA, both substantively and procedurally.⁵⁶ This section will examine the history of California's statute in order to project how the Texas statute might be applied over time. The analysis will focus primarily on media defendants.⁵⁷

Traditional anti-SLAPP statutes focus on the right to petition.⁵⁸ The right to free speech is generally protected if it relates to the exercise of the defendant's right to petition.⁵⁹ The California legislature has made it clear, though, that the right to free speech is protected independent of its relation to the right to petition.⁶⁰ Although considered to be one of the broadest anti-SLAPP statutes in existence, the California anti-SLAPP statute was initially drafted narrowly.⁶¹ The statute was very specific as to what types of expression were protected:

[A]ny written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, . . . any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, . . . [or] any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest. . . .⁶²

The specificity involved in the initial drafting of the statute indicates the legislature's intent to construe the statute narrowly and apply it only to situations involving government and politics.⁶³ This specific remedial

54. Osborn & Thaler, *supra* note 16, at 33.

55. *See* Tate, *supra* note 11, at 801–02 (pointing out that the statute provided for a special motion to strike early on in the litigation process as well as a freeze in the discovery period).

56. *Compare* CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2014) (protecting the right to free speech and the right to petition independently of one another, while also providing a stay in discovery once the defendant files an anti-SLAPP motion in a pending case), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West Supp. 2014) (protecting the right to free speech and right to petition, while allowing for a stay in discovery).

57. *See infra* Part III.C.

58. Tate, *supra* note 11, at 812.

59. *Id.*

60. *Id.* at 812–14.

61. Segal, *supra* note 25, at 646–47.

62. CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2014).

63. *See* Segal, *supra* note 25, at 646–47.

scheme is closer to the one Pring and Canan contemplated than a statute drafted and construed broadly.⁶⁴ Despite the careful drafting, courts differed in how broadly they construed the statute, with some extending protection under the statute to forms of expression not likely contemplated by the legislature.⁶⁵ Other courts, however, were more conservative and construed the statute rather narrowly.⁶⁶

A. *Zhao v. Wong: New Statute Interpreted Narrowly*

One case in particular, *Zhao v. Wong*, illustrates the narrow interpretation employed by some courts regarding the relatively new statute.⁶⁷ In this case, the defendant, Wong, accused Zhao of murdering Wong's brother and tampering with his will.⁶⁸ Wong made these accusations to the *San Jose Mercury News*, hoping that the news outlet would publish the story and that media coverage would encourage the police to investigate the case further.⁶⁹ The court held that the California statute did not protect the statements Wong made to the media.⁷⁰ Although the court recognized that issues of public interest are not necessarily limited to issues of government, it pointed out that something does not necessarily become an issue of public interest just because the media reported it.⁷¹ Essentially, the media cannot create a public issue on its own.⁷² The court pointed to the specificity of the statute and determined that it protected only the "highest rung" of First Amendment expression.⁷³ In the court's view, Wong's allegedly slanderous comments to the media about Zhao did not fall under this category.⁷⁴ Because of the California appellate courts' divergent decisions, the legislature redrafted portions of the law, attempting to expand its coverage.⁷⁵

64. *Id.* at 647.

65. *Id.* One court concluded that one need not necessarily petition the government to receive protection under the statute, and that comments made in private could also be protected. *Id.* Another court extended anti-SLAPP protection to a citizen who was sued in retaliation for serving as a witness against the Church of Scientology because the right to testify in court was closely related to the right to petition and, because of the Church's powerful nature, this issue constituted a matter of public interest. *Id.*

66. *Id.*

67. *See id.* *See generally* *Zhao v. Wong*, 55 Cal. Rptr. 2d 909 (Cal. Ct. App. 1996), *disapproved of* by *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564 (Cal. 1999).

68. *Zhao*, 55 Cal. Rptr. 2d at 911.

69. *See id.*; Segal, *supra* note 25, at 647–48.

70. *Zhao*, 55 Cal. Rptr. 2d at 921.

71. *Id.* at 1121–22.

72. *See id.*

73. *Id.* at 913 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (internal quotation marks omitted); *see* Segal, *supra* note 25, at 648.

74. *See Zhao*, 55 Cal. Rptr. 2d at 919–21.

75. Segal, *supra* note 25, at 648.

B. The 1997 Amendments and Resulting Rise in Anti-SLAPP Motions

In 1997, the California Legislature amended and unanimously approved the statute.⁷⁶ The primary goal of the amendment was to explicitly convey that the legislature intended for the statute to be construed broadly.⁷⁷ The amended statute also provided a type of catch-all provision for protected expression, moving away from the calculated and specific structure of the statute when it was first enacted.⁷⁸ The amendments also clarified that the statute protected conduct, along with the oral and written statements that were explicitly protected in the original statute.⁷⁹

Not surprisingly, the number of anti-SLAPP motions skyrocketed after the 1997 amendments to the California statute.⁸⁰ Courts began to rule increasingly in favor of large corporations, a trend best illustrated by *DuPont Merck Pharmaceutical Co. v. Superior Court*.⁸¹ In this case, individuals brought a class-action suit against a pharmaceutical company for allegedly making false statements about the effectiveness of a generic drug.⁸² The pharmaceutical company argued that the class-action suit was repressing its statements, and therefore the California statute protected those statements.⁸³ Interestingly, the court bought this argument, determining that the company's statements were related to an issue of public interest.⁸⁴ Canan commented specifically on this case, lamenting, “[h]ow ironic and sad, then, that corporations in California have now turned to using meritless anti-SLAPP motions as a litigation weapon. This turns

76. Tate, *supra* note 11, at 807–08.

77. *Id.* at 808.

78. See Segal, *supra* note 25, at 649. The statute provided additional protection for “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” CAL. CIV. PROC. CODE § 425.16(e)(4) (West 2004 & Supp. 2014).

79. Tate, *supra* note 11, at 808.

80. See Segal, *supra* note 25, at 651.

81. See *id.* See generally *DuPont Merck Pharm. Co. v. Superior Court*, 92 Cal. Rptr. 2d 755 (Cal. Ct. App. 2000) (concluding that a pharmaceutical company's misleading statements about its drug satisfied the public issue inquiry of an anti-SLAPP analysis because of both the number of individuals taking the drug and the serious conditions it treated).

82. Segal, *supra* note 25, at 651. The pharmaceutical company manufactured the blood-thinning drug Coumadin. *DuPont*, 92 Cal. Rptr. 2d at 757. The generic form of the drug is warfarin sodium. *Id.* The plaintiffs alleged that the pharmaceutical company made false statements about the generic product so that the Food and Drug Administration would not approve it. *Id.* at 757–58. Without FDA approval, the generic product could not enter the market, thereby driving up the price of Coumadin. See *id.* at 757.

83. See Segal, *supra* note 25, at 651; see also *DuPont*, 92 Cal. Rptr. 2d at 758 (stating that the pharmaceutical company moved to strike plaintiff's complaint under the anti-SLAPP statute).

84. See *DuPont*, 92 Cal. Rptr. 2d, at 759. The court determined that Coumadin use was related to an issue of public concern because (1) over 1.8 million people were using the drug at the time, and (2) the drug was designed to treat critical, life-threatening health problems. See *id.* The court stated: “Both the number of persons allegedly affected and the seriousness of the conditions treated establish the issue as one of public interest.” *Id.*

the original intent of one of the country's most comprehensive and effective anti-SLAPP laws on its head."⁸⁵

C. *The Amended Statute: A Safe Haven for Media Defendants*

Because of the broad way in which California courts construe the state's anti-SLAPP statute, it has served as a safe haven for media defendants.⁸⁶ In contrast to other states' anti-SLAPP statutes, California's statute does not merely protect speech that relates solely to governmental issues; rather, it protects a broader range of speech related to public concern.⁸⁷ California courts have been very liberal in defining what exactly constitutes an issue of public concern, and media defendants have used this liberal construction to their advantage since the statute's passage.⁸⁸

A case that illustrates the broad nature of California's anti-SLAPP statute as it pertains to media defendants is *Doe v. One America Productions*.⁸⁹ The plaintiffs in this case appeared in Sacha Baron Cohen's Golden Globe-winning film, *Borat*.⁹⁰ The movie showed the young men consuming alcohol and expressing sexist and racist sentiments.⁹¹ Although the plaintiffs signed releases to be in the film, they claimed that they consented with the understanding that it would not be shown in the United States.⁹² As a result, they sued One America Productions for fraud, false light, appropriation of likeness, and negligent infliction of emotional distress.⁹³ The production company responded by filing a motion to dismiss under California's anti-SLAPP statute, which the trial court granted.⁹⁴ The court held that the plaintiffs' sexist and racist comments were in the public interest, and they therefore had to show a probability of prevailing on the claim even before discovery ensued.⁹⁵ The young men were not able to meet this burden of proof, and the case was subsequently dismissed.⁹⁶

85. Segal, *supra* note 25, at 651 (alteration in original) (quoting *Anti-SLAPP (Strategic Lawsuit Against Public Participation) Law: Restrictions on Use of Special Motion to Strike: Hearing on S.B. 515 Before the S. Judiciary Comm.*, 2003–2004 Reg. Sess. at 6 (Cal. 2003) (statement of Dr. Penelope Canan, Professor, University of Denver)).

86. See Wright-Pegs, *supra* note 40, at 334.

87. See *id.*

88. See *id.*

89. See *id.* at 324–25, 336–38; see also Complaint at 15, *Doe v. One Am. Prods., Inc.*, (No. SC091723), 2006 CA Sup. Ct. Pleadings LEXIS 984, at *15 (W.D. Cal. Nov. 9, 2006) (claiming a media defendant depicted the plaintiff in a false light to the public as being insensitive to minorities).

90. See Complaint, *supra* note 89, at *2–5; Wright-Pegs, *supra* note 40, at 324.

91. See Complaint, *supra* note 89, at *5–8; Wright-Pegs, *supra* note 40, at 324.

92. Complaint, *supra* note 89, at *5–7.

93. *Id.* at *7–17.

94. See Wright-Pegs, *supra* note 40, at 324–25.

95. See *id.*; CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2014).

96. See Wright-Pegs, *supra* note 40, at 324–25.

California media defendants have arguably exploited their state's anti-SLAPP statute to the point of abuse.⁹⁷ The result of *Spears v. US Weekly, LLC* illustrates just how far media conglomerates have pushed the envelope in attempting to protect their speech under the California statute.⁹⁸ Music artist Britney Spears sued *US Weekly*, accusing it of both libel and defamation after the news outlet reported that Spears and her then-boyfriend, Kevin Federline, had made a sex tape.⁹⁹ The court dismissed the case under California's anti-SLAPP statute, finding that the story published by *US Weekly* was sufficiently connected to an issue of public concern or public interest to warrant statutory protection.¹⁰⁰

This decision is ironic in that it created an inverted paradigmatic SLAPP scenario.¹⁰¹ Instead of protecting the individual against a large corporate entity, it provides a safe haven for a corporate entity to bully an individual citizen.¹⁰² Despite the fact that Britney Spears is an entertainer and puts herself in the public spotlight, should this foreclose her ability to pursue libel and defamation remedies? Also, is her personal life of such "public significance" that media speculation regarding it should be protected under California's anti-SLAPP statute?¹⁰³ Regardless of the unique circumstances of the case, one must wonder whether the media's utilization of the California statute has run afoul of the legislature's original intent.¹⁰⁴

IV. THE MASSACHUSETTS ANTI-SLAPP STATUTE: BROAD INTERPRETATION OF PETITIONING ACTIVITY

California is not alone in interpreting its anti-SLAPP statute broadly.¹⁰⁵ Massachusetts's anti-SLAPP statute has been interpreted to extend to private issues as well as public ones.¹⁰⁶ Unlike the TCPA, which protects multiple First Amendment rights, the Massachusetts anti-SLAPP statute protects only the right to petition.¹⁰⁷ The protection that extends to petitioning activity, however, is extraordinarily broad because there is no

97. *See id.* at 334–36.

98. *See id.*

99. *See id.* at 334–35.

100. *See id.* at 335.

101. *See supra* Part II.A.

102. *See supra* Part II.A.

103. *See* CAL. CIV. PROC. CODE § 425.16(a) (West 2004 & Supp. 2014).

104. *See* Segal, *supra* note 25, at 646–47.

105. *See generally* Rebecca Ariel Hoffberg, Note, *The Special Motion Requirements of the Massachusetts Anti-SLAPP Statute: A Real Slap in the Face for Traditional Civil Practice and Procedure*, 16 B.U. PUB. INT. L.J. 97 (2006) (discussing the broad manner in which Massachusetts courts have construed its anti-SLAPP statute).

106. *Id.* at 105.

107. *See* MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2014); TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West Supp. 2014).

requirement that the petitioning activity address issues of public concern.¹⁰⁸ The Massachusetts statute was enacted in 1994, but it took four years until the state's supreme court addressed an anti-SLAPP issue.¹⁰⁹

A. *The Duracraft Decision*

Prior to the Massachusetts Supreme Judicial Court's landmark decision in *Duracraft Corp. v. Holmes Products Corp.*, lower courts interpreted the statute to require that the petitioning activity at issue deal with a public issue.¹¹⁰ In *Duracraft*, the lower court denied the defendant's special motion to dismiss because the conflict involved exclusively private interests, and therefore the statute did not apply.¹¹¹ The appellate court subsequently reversed the trial court's decision, and the Massachusetts Supreme Judicial Court affirmed the appellate court's reversal.¹¹² In interpreting the legislature's intent, the supreme court noted that the legislature defined the right to petition broadly, and there was no language that specifically required a petition to pertain to an issue of public concern.¹¹³ According to the Massachusetts statute, whether one may be labeled a "petitioner" depends not on the type of activity the individual is engaged in, but rather the types of people or entities the individual is engaged with.¹¹⁴ A person who has any sort of interaction whatsoever with any branch of the state government is technically labeled a petitioner.¹¹⁵ This has opened the door to an almost limitless application of Massachusetts's anti-SLAPP statute because the petitioning activity need not pertain to a matter of public concern.¹¹⁶ Theoretically, two private parties could use an anti-SLAPP motion because the act of filing a lawsuit in itself is technically a petitioning activity.¹¹⁷ Like the California anti-SLAPP statute, the Massachusetts anti-SLAPP statute allows a wide variety of different defendants to use the statute as a means to quickly dismiss a cause of action, whether or not they fall into the paradigmatic SLAPP scenario Pring and Canan envisioned.¹¹⁸

108. Hoffberg, *supra* note 105, at 103.

109. *Id.* at 99–100.

110. *Id.* at 102.

111. *Id.* at 100; *see Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 941 (Mass. 1998).

112. *Duracraft*, 691 N.E.2d at 935.

113. Hoffberg, *supra* note 105, at 102; *see Duracraft*, 691 N.E.2d at 941.

114. *See* MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2014); Hoffberg, *supra* note 105, at 101–02.

115. *See* Hoffberg, *supra* note 105, at 101–02; *see also* MASS. GEN. LAWS ANN. ch. 231, § 59H (describing the many ways one becomes a petitioner through interaction with the state government).

116. *See* Hoffberg, *supra* note 105, at 102.

117. *Id.* at 104.

118. *See id.* at 102; *supra* Part II.B.

V. EXAMPLES OF NARROW STATUTORY CONSTRUCTION

While California and Massachusetts arguably have some of the broadest anti-SLAPP statutes, other states have drafted narrowly tailored laws that, for example, explicitly lay out which types of individuals may utilize an anti-SLAPP motion.¹¹⁹ Some states only allow anti-SLAPP motions when there is government involvement.¹²⁰ For example, the Delaware anti-SLAPP statute limits the type of individuals who may utilize its anti-SLAPP motion by narrowly defining what type of petitioning activity is covered under the statute.¹²¹ The New York and Nebraska anti-SLAPP statutes contain very similar definitions of petitioning activity, thus limiting the number of potential candidates for the anti-SLAPP motion.¹²² The State of Hawaii has narrowed its definition of petitioning activity so that it encompasses only government activity.¹²³ Although the Hawaii statute narrows the amount of potential anti-SLAPP candidates more so than the California and Massachusetts statutes, it is not quite as narrow as the Delaware, New York, and Nebraska statutes because there is no requirement that the petitioning activity pertain to a public issue.¹²⁴

VI. THE TEXAS CITIZENS PARTICIPATION ACT

A. Legislative Debate

In 2011, Texas became the twenty-eighth state (along with the District of Columbia) to pass an anti-SLAPP law.¹²⁵ The legislature noted that the Internet age created a rise in SLAPPs, as it “has created a searchable record of public participation.”¹²⁶ It also pointed out that the only protection for

119. See Wright-Pegs, *supra* note 40, at 332–33; see, e.g., N.Y. CIV. RIGHTS LAW § 76-a (McKinney 2009).

120. Wright-Pegs, *supra* note 40, at 333; see WASH. REV. CODE ANN. § 4.24.510 (West 2005) (limiting protected speech to communications made to government agencies).

121. See DEL. CODE ANN. tit. 10, § 8136 (West 2013). This provision of the Delaware anti-SLAPP statute defines an “‘action involving public petition and participation’ [as] an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permission.” *Id.* § 8136(a)(1).

122. See N.Y. CIV. RIGHTS LAW § 76-a; see also NEB. REV. STAT. ANN. § 25-21,242 (West 2014) (limiting petitioning activity to “an action, claim, cross-claim, or counterclaim for damages that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge, or oppose the application or permission”).

123. HAW. REV. STAT. § 634F-2 (West 2014); Erin Malia Lum, *Hawai‘i’s Response to Strategic Litigation Against Public Participation and the Protection of Citizens’ Right to Petition the Government*, 24 U. HAW. L. REV. 411, 427 (2001).

124. Lum, *supra* note 123, at 428; see HAW. REV. STAT. § 634F-2. Any language requiring that there be a “public issue” or “matter of public concern” is absent from the statute. HAW. REV. STAT. § 634F-2.

125. Tex. H.B. 2973, 82d Leg., R.S. (2011) (“Bill Analysis”).

126. *Id.*

victims of SLAPPs up to that point was summary judgment, which occurs after a lengthy discovery process.¹²⁷ Proponents of the anti-SLAPP bill noted that if the legislature were to provide a mechanism for the quick dismissal of the case, it “would allow frivolous lawsuits to be dismissed at the outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system.”¹²⁸ Opponents of the bill, however, recognized that the bill could have a negative effect upon a legitimate plaintiff, who would have to “overcome motions testing its pleadings.”¹²⁹ Opponents worried that the special motion to dismiss might even intimidate a legitimate plaintiff to the point that he or she might not seek a remedy that may very well be deserved.¹³⁰

B. Specific Provisions of the TCPA

The purported purpose of the TCPA is to “encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.”¹³¹ If the plaintiff’s action “is based on, relates to, or is in response to” the defendant’s exercise of the above constitutional rights, the defendant may move to dismiss the case.¹³² The defendant must file the motion to dismiss within sixty days of service.¹³³ Once the defendant files in a timely manner, the discovery process halts until the court rules on the motion.¹³⁴

At this point, the court must set a hearing on the motion no later than sixty days after the defendant serves the motion.¹³⁵ The time for the hearing may be extended if the court’s docket so requires, if the parties agree, or if one of the parties shows good cause for an extension.¹³⁶ Regardless of the circumstances, the court must set the hearing within ninety days of the filing of the motion.¹³⁷ The only way by which a hearing may be set after ninety days is if the court allows limited discovery.¹³⁸ In this case, the court must set the hearing no later than 120 days after the defendant’s filing of the special motion to dismiss.¹³⁹

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.*

131. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West Supp. 2014).

132. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West Supp. 2014).

133. *Id.* § 27.003(b).

134. *Id.* § 27.003(c).

135. TEX. CIV. PRAC. & REM. CODE ANN. § 27.004(a) (West Supp. 2014).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* § 27.004(c).

Once the hearing on the motion has taken place, the court must rule on the motion within thirty days of the hearing.¹⁴⁰ The court shall dismiss the suit if the defendant shows that the suit “is based on, relates to, or is in response to” the defendant’s exercise of the right to free speech, the right to petition, or the right of association.¹⁴¹ The defendant must make this showing by a preponderance of the evidence.¹⁴² The court is not permitted to dismiss the case if the plaintiff “establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.”¹⁴³ Even if the plaintiff meets this burden, the court shall dismiss the suit if the defendant is able to establish, by a preponderance of the evidence, each element of a valid defense to the claim at issue.¹⁴⁴

In deciding whether to dismiss the suit, the court may consider the pleadings as well as supporting and opposing affidavits from each side.¹⁴⁵ In addition, the court may allow “specified and limited discovery” upon a showing of good cause by either party.¹⁴⁶ If the court does not rule on the motion in a timely manner, the motion is considered denied by operation of law.¹⁴⁷ If this occurs, the defendant may appeal.¹⁴⁸ The statute provides that any appeal should be expedited, whether the appeal is from the trial court’s ruling on the motion or from the trial court’s failure to rule on the motion.¹⁴⁹

If the court dismisses the case, it shall award court costs, attorney’s fees, and other expenses associated with defending the case to the defendant.¹⁵⁰ In addition, the court shall award sanctions against the plaintiff to the extent the court deems sufficient to deter the plaintiff from bringing suits in the future.¹⁵¹ If the court finds that the defendant frivolously filed the motion to dismiss so as to delay the case, however, it may award the plaintiff court costs and attorney’s fees.¹⁵²

140. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(a) (West Supp. 2014).

141. *Id.* § 27.005(b).

142. *Id.*

143. *Id.* § 27.005(c).

144. *Id.* § 27.005(b).

145. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West Supp. 2014).

146. *Id.* § 27.006(b).

147. TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(a) (West Supp. 2014).

148. *Id.*

149. *Id.* § 27.008(b).

150. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a) (West Supp. 2014).

151. *Id.*

152. *Id.* § 27.009(b).

C. Cases Involving Media Defendants: Is Texas the New California?

Media defendants have already used the TCPA to their advantage in multiple cases since the statute passed.¹⁵³ In one of the early cases governed by the TCPA, *Avila v. Larrea*, the media defendant, Univision Television Group, Inc. (Univision), successfully appealed the trial court's failure to grant its initial motion to dismiss, filed in accordance with the TCPA.¹⁵⁴ Larrea, a Dallas-area attorney, alleged that Avila, a reporter for KUVN Channel 23—owned and operated by Univision—made false statements about him in a pair of broadcasts that aired on KUVN on two consecutive days in May 2011.¹⁵⁵ The broadcasts were also made available on Univision's website.¹⁵⁶ Larrea claimed that Avila's allegedly false statements seriously injured his reputation, and as a result, he attempted to recover both actual and punitive damages.¹⁵⁷ Univision filed a motion to dismiss in a timely manner as required by the TCPA, and the trial court failed to rule on the motion in a timely manner.¹⁵⁸ The case then went to the Dallas Court of Appeals on an interlocutory appeal.¹⁵⁹ The appellate court held that the trial court erred by not granting Univision's motion to dismiss because the record did not show any evidence that Avila's statements were false.¹⁶⁰

Larrea's response and affidavit pointed out that this particular case was "ironic" in that it involved a large company using the TCPA to defend itself against an ordinary individual.¹⁶¹ Larrea remarked that the purpose of the TCPA was to "level[] the playing field in David versus [Goliath] scenarios involving the First Amendment."¹⁶² The court's decision, however, reflected that the TCPA may be utilized by corporations and individuals alike to vindicate constitutional rights.¹⁶³ In their brief in support of their motion to dismiss, the appellants argued that Larrea did not establish "by 'clear and specific evidence' a prima facie case for every element of his

153. See *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 90 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 688–89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Avila v. Larrea*, 394 S.W.3d 646, 653–56 (Tex. App.—Dallas 2012, pet. denied).

154. *Avila*, 394 S.W.3d at 650.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See id.* at 649–50.

159. *Id.* at 649.

160. *Id.* at 662.

161. *Id.* at 651.

162. *Id.* at 650–51 (quoting Larrea's response).

163. *See id.* at 655. The appellate court determined that Larrea met his burden of showing that the TCPA was applicable in this scenario because the broadcast at issue was "based on, relating to, or in response to" a party's exercise of the right of free speech." *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West Supp. 2014)). The court did not take into consideration the fact that this case fell outside the paradigmatic SLAPP scenario. *See id.*

cause of action.”¹⁶⁴ The court recognized that the TCPA does not define what clear and specific evidence means, but it avoided the problem of interpreting that specific provision by simply finding that the record showed no evidence that Avila’s statements were false.¹⁶⁵

Another case in which a media defendant has prevailed under the TCPA is *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*¹⁶⁶ This lawsuit stemmed from a number of articles published in a local newspaper in Mineral Wells, Texas, concerning troubling events and circumstances at an assisted living facility called Crazy Water Retirement Hotel.¹⁶⁷ The articles implicated the conduct of Charles Miller, who served as both the corporate owner and president of Crazy Water Retirement Hotel.¹⁶⁸ The newspaper published stories in 2010 and 2011 detailing the various problems that had occurred at the assisted living facility.¹⁶⁹ Among these issues were “complaints of unsafe conditions, building disrepair, failure to provide services and verbal abuse of residents.”¹⁷⁰ Miller’s original petition centered on one particular article entitled, *Miller Target of Fraud Probe*, suggesting that Miller might be guilty of Medicaid fraud.¹⁷¹

Miller initiated his lawsuit in 2011, bringing claims against the defendants for defamation, tortious interference, and business disparagement.¹⁷² The trial court denied the defendants’ motion to dismiss, and as a result, the defendants appealed.¹⁷³ After going through the elements of each claim and applying the appropriate provisions of the TCPA, the court held that the appellants satisfied their burden of showing that the statements made were in the exercise of the right to petition and the right to free speech.¹⁷⁴ Additionally, the court concluded that Miller did not satisfy his burden since he failed to establish by clear and specific evidence a prima facie case for each essential element of each claim.¹⁷⁵

In July 2013, yet another media defendant prevailed in a case involving the TCPA in *KTRK Television, Inc. v. Robinson*.¹⁷⁶ Theola Robinson, the founder of a charter school, Benji’s Special Education Academy (Benji’s), sued KTRK for defamation after a series of reports

164. *Id.* at 652.

165. *See id.* at 658–62.

166. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 75 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

167. *Id.*

168. *Id.*

169. *Id.* at 76.

170. *Id.*

171. *Id.* at 77.

172. *Id.* at 78.

173. *Id.*

174. *Id.* at 80.

175. *Id.* at 90.

176. *See KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 692 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

aired indicating that she had been financially irresponsible in managing the school.¹⁷⁷ Specifically, Robinson claimed that the reports insinuated that she had embezzled over three million dollars—a false allegation of criminal behavior.¹⁷⁸ Robinson argued that these broadcasts were injurious to her reputation and, to support her argument, she relied in part on anonymous comments on KTRK’s website.¹⁷⁹ The court made it clear, however, that anonymous third-party comments on a website cannot be used to prove defamation per se.¹⁸⁰

Before the court determined whether Robinson met her burden by establishing by clear and specific evidence a prima facie case for each essential element of her defamation claim, it attempted to explain what clear and specific evidence meant, after acknowledging that it was not defined in the statute.¹⁸¹ Because it is not defined in the TCPA, the court assigned the phrase “clear and specific” its ordinary meaning.¹⁸² The court cited *Black’s Law Dictionary*, which defines clear as “unambiguous, sure, or free from doubt.”¹⁸³ It defines specific as “explicit or relating to a particular named thing.”¹⁸⁴ Ultimately, the court determined that no report unambiguously accused Robinson of engaging in criminal activity; furthermore, there was nothing reported that injured her in her profession.¹⁸⁵ Because she did not establish a prima facie case for defamation per se by clear and specific evidence, the court reversed the trial court’s denial of the network’s motion to dismiss.¹⁸⁶

VII. PROBLEMS WITH THE TEXAS CITIZENS PARTICIPATION ACT

The problems with the TCPA can generally be categorized as definitional and procedural.¹⁸⁷ The combined effect of these problems has led to an over-application of the statute to situations that clearly fall outside of the classic SLAPP paradigm.¹⁸⁸ First, the definitional problems

177. *Id.* at 684.

178. *Id.* at 690–91.

179. *Id.* at 691.

180. *See id.*

181. *Id.* at 689.

182. *Id.*

183. *Id.* (quoting BLACK’S LAW DICTIONARY 268 (8th ed. 2004)) (internal quotation marks omitted).

184. *Id.* (quoting BLACK’S LAW DICTIONARY 268 (8th ed. 2004)) (internal quotation marks omitted).

185. *Id.* at 692.

186. *See id.*

187. *See infra* Part VII.A–B.

188. *See supra* Part II.A. So far, Texas court rulings in anti-SLAPP cases have overwhelmingly favored big companies—specifically media conglomerates—over individual citizens, instead of protecting individuals against big companies in accordance with the paradigm. *See, e.g.*, *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 90 (Tex. App.—Houston [1st Dist.]

contained in the statute will be addressed.¹⁸⁹ Then, the procedural problems will be addressed.¹⁹⁰

A. Definitional Problems

Section 27.005 of the Texas Civil Practice and Remedies Code provides that once a defendant files a special motion to dismiss, a court “may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.”¹⁹¹ The problem, however, is that what constitutes clear and specific evidence is entirely missing from the definitions section of the statute under § 27.001.¹⁹² Some courts have attempted to tackle the dilemma presented by this omission,¹⁹³ while most have ignored the issue altogether.¹⁹⁴ These inconsistencies are problematic because they do not provide the party bringing the legal action any guidance as to what the party must show in order to avoid the dismissal of the case. They also do not provide Texas courts any guidance as to how they must apply the standard. On its face, the showing of clear and specific evidence appears to be a very high burden of proof to meet.¹⁹⁵ How this burden stacks up against some of the more well-defined and well-established burdens of proof in Texas law is yet to be seen.¹⁹⁶ This burden is much more ambiguous than that of the California anti-SLAPP statute, which provides that a court may not dismiss a legal action if the party bringing the legal action can show a probability of prevailing on the claim.¹⁹⁷ Conceptually, this burden of proof is easy enough to understand so that a definition is not necessary. Considering the reluctance of Texas courts so far to take up the question of what clear and specific evidence means,¹⁹⁸ and also considering that the few courts that have attempted to determine the

2013, pet. denied); *Robinson*, 409 S.W.3d at 692; *Avila v. Larrea*, 394 S.W.3d 646, 662 (Tex. App.—Dallas 2012, pet. denied).

189. See *infra* Part VII.A.

190. See *infra* Part VII.B.

191. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West Supp. 2014).

192. *Id.*; see TEX. CIV. PRAC. & REM. CODE ANN. § 27.001 (West Supp. 2014).

193. See *Robinson*, 409 S.W.3d at 689; see also *Alphonso v. Deshotel*, 417 S.W.3d 194, 197 (Tex. App.—El Paso 2013, no pet.) (examining case law to determine the definition of clear and specific evidence). The First Court of Appeals used the plain and ordinary meanings of the words “clear” and “specific” as they are defined in the eighth edition of *Black’s Law Dictionary*. *Robinson*, 409 S.W.3d at 689. The El Paso Court of Appeals, however, used clear and specific as it was defined in *McDonald v. Clemens*: “evidence unaided by presumptions, inferences, or intendments.” *Alphonso*, 417 S.W.3d at 197 (quoting *McDonald v. Clemens*, 464 S.W.2d 450, 456 (Tex. Civ. App.—Tyler 1971, no writ)).

194. See *Avila v. Larrea*, 394 S.W.3d 646, 658–62 (Tex. App.—Dallas 2012, pet. denied).

195. TEX. CIV. PRAC. & REM. CODE § 27.005.

196. See *infra* notes 200–01 and accompanying text.

197. See CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2014).

198. See *Avila*, 394 S.W.3d at 658–62.

definition have reached different conclusions,¹⁹⁹ it is apparent that more guidance from the legislature is needed.

Some critics of the TCPA have even suggested that, depending on what clear and convincing evidence means, this burden of proof might amount to a violation of the open courts provision of the Texas Constitution.²⁰⁰ The open courts provision contained in Article I, § 13 of the Texas Constitution states that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”²⁰¹ The concern is that, on its face, the clear and specific evidence standard appears to be a higher burden than the “preponderance of the evidence” standard necessary to prevail at the trial stage.²⁰² Additionally, it appears to be a much higher burden than the “scintilla” of evidence required to create a genuine issue of material fact at the summary judgment stage.²⁰³ If the clear and specific standard is as daunting from the plaintiff’s point of view as it appears to be, this heavy burden certainly raises the constitutional question of whether the plaintiff is afforded due course of law in seeking a remedy.²⁰⁴ It seems unduly burdensome to require a plaintiff to prove something by such a high standard of evidence, especially at a stage in the litigation process that precedes summary judgment.

The second definitional problem with the TCPA pertains to its overbroad definition of what constitutes a “[m]atter of public concern.”²⁰⁵ The TCPA protects the exercise of free speech, which means “a communication made in connection with a matter of public concern.”²⁰⁶ The statute goes on to define a matter of public concern as something related to (1) health or safety; (2) environmental, economic, or community well-being; (3) the government; (4) a public official or a public figure; or (5) a good, product, or service in the marketplace.²⁰⁷ Unlike the definitional issue with “clear and specific evidence,” the problem here is not about the

199. See *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (defining the terms clear and ambiguous with their ordinary meanings found in *Black’s Law Dictionary*); see also *Alphonso v. Deshotel*, 417 S.W.3d 194, 197 (Tex. App.—El Paso 2013, no pet.) (defining clear and specific evidence as the *McDonald* court did, as “evidence unaided by presumptions, inferences, or intendments” (quoting *McDonald v. Clemens*, 464 S.W.2d 450, 456 (Tex. Civ. App.—Tyler 1971, no writ))) (internal quotation marks omitted).

200. Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, JD SUPRA BUS. ADVISOR (Sept. 11, 2012), <http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/>.

201. TEX. CONST. art. I, § 13.

202. Walker & Mirazo, *supra* note 200, at 12.

203. *Id.* at 12–13.

204. See TEX. CONST. art. I, § 13; Walker & Mirazo, *supra* note 200, at 12–13.

205. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (West Supp. 2014).

206. *Id.* § 27.001(3).

207. *Id.* § 27.001(7)(A)–(E).

omission of a definition.²⁰⁸ Rather, the problem is that what constitutes a matter of public concern according to the statute is defined too broadly.²⁰⁹

The over breadth of this definition can be seen by examining how it has been applied in Texas cases thus far.²¹⁰ One case that illustrates just how broad a matter of public concern has been construed by Texas courts is *Better Business Bureau of Metropolitan Dallas, Inc. v. BH DFW, Inc.*²¹¹ BH DFW is a company that builds swimming pools primarily in the Dallas/Fort Worth Metroplex.²¹² The Better Business Bureau is a nonprofit that, among other public services, provides ratings on a scale of “A+” to “F” in reviewing different businesses.²¹³ If a business wishes to be accredited by the Better Business Bureau, it must pay a yearly fee and adhere to certain standards, one of which is to “advertise honestly.”²¹⁴ The Better Business Bureau gave BH DFW the grade “A+” for many years between 1981 and 2010.²¹⁵

During the summer of 2010, BH DFW advertised its business in a Dallas newspaper, claiming to be the “World’s Largest!”²¹⁶ In July 2010, an employee of the Better Business Bureau contacted BH DFW, asking that it substantiate its claim.²¹⁷ BH DFW responded by sending the Better Business Bureau data showing that it had been the largest swimming pool business in the country for many years and that only one other swimming pool company besides BH DFW operated on a national scale.²¹⁸ Additionally, BH DFW analyzed a number of factors to claim that swimming pools are constructed on a much larger scale in the United States than any other country.²¹⁹ This attempt at substantiation, however, did not satisfy the Better Business Bureau.²²⁰ The same Better Business Bureau employee that initially contacted BH DFW wanted the company to “provide a list of five countries known to have a significant pool-building presence and identify what you believe to be the largest pool company within each of the five countries, citing the source. Then identify how [BH DFW] is larger.”²²¹ BH DFW responded by essentially saying that there was no

208. See Walker & Mirazo, *supra* note 200, at 7–8.

209. See TEX. CIV. PRAC. & REM. CODE § 27.001(7).

210. See, e.g., *Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 305 (Tex. App.—Dallas 2013, pet. denied).

211. See *id.*

212. *Id.* at 303.

213. *Id.* at 302.

214. *Id.*

215. *Id.* at 303.

216. *Id.*

217. *Id.*

218. See *id.*

219. *Id.* The factors that BH DFW pointed to included: “[C]limate, disposable income, access to financing, and availability of detached family homes on adequate-size plots of land, that limited a ‘swimming pool culture’ from flourishing in other countries.” *Id.*

220. See *id.*

221. *Id.*

quantifiable way to measure its pool construction infrastructure against every pool company's infrastructure in the world.²²² Furthermore, BH DFW pointed out that it had used the "World's Largest!" advertisement for many years without incident, and no one had ever disputed that claim.²²³ When BH DFW failed to present the requested information concerning the accuracy of its claim to the Better Business Bureau, BH DFW lost its status as an accredited business, and the Better Business Bureau changed BH DFW's rating from an "A+" to an "F."²²⁴ On its website, the Better Business Bureau explained that it lowered BH DFW's rating because of "[a]dvertising issues" that prevented BH DFW from honoring its accreditation agreement.²²⁵

Upon losing its accreditation, BH DFW sued for breach of contract and requested a temporary injunction that would, among other things, have the Better Business Bureau restore BH DFW's former "A+" rating.²²⁶ In response, the Better Business Bureau filed a motion to dismiss in accordance with the TCPA because BH DFW's legal action was "based on, related to, or in response to the [Better Business Bureau's] exercise of its right of free speech."²²⁷ The district court denied the motion, reasoning that the TCPA is applicable only when participation in government is involved.²²⁸ Shortly thereafter, the Better Business Bureau appealed.²²⁹

The Dallas Court of Appeals, however, recognized that the TCPA as a whole applies to a wide variety of circumstances—not exclusively to situations involving government participation.²³⁰ The court pointed out that what the legislature defined as a matter of public concern applied to a much broader array of situations, and one of those situations was any communication "related to a good, product, or service in the marketplace."²³¹ The court held that the Better Business Bureau's review of BH DFW was a communication made in a matter of public concern under the statutory definition because it was related to a good, product, or service in the marketplace (the construction of swimming pools).²³² Therefore, the TCPA applied because it was an exercise of the Better Business Bureau's right to free speech, as it is statutorily defined.²³³

222. *Id.*

223. *See id.*

224. *Id.* at 303–04.

225. *Id.* at 304.

226. *Id.*

227. *Id.*

228. *See id.*

229. *Id.* at 301.

230. *See id.* at 308.

231. *Id.*

232. *See id.*

233. *Id.*

This case is a great example of the extraordinarily vast amount of issues that qualify as matters of public concern as they are defined in the TCPA.²³⁴ Is the Better Business Bureau's review of BH DFW's business "related to a good, product, or service in the marketplace"?²³⁵ Yes, but only very loosely.²³⁶ Under the statutory definition of matter of public concern, however, it does not matter how strong the relation is between the communication at issue and the subject matter of the communication.²³⁷ On its face, the statute appears to say that if a communication is *in any way* related to a good, product, or service in the marketplace, then it is a matter of public concern.²³⁸ But is the Better Business Bureau's "F" rating for BH DFW's business really a matter of public concern such that it deserves extra statutory protection? One might be able to envision a scenario in which a business review of a swimming pool construction company could qualify as a public concern. For example, if the Better Business Bureau had given BH DFW an "F" rating for repeatedly constructing faulty drains or otherwise constructing pools that were not up to standard, the review could arguably qualify as a matter of public concern. It would become a safety issue of which the public has a right to be informed. This was not the issue in the case at hand.²³⁹ The Better Business Bureau did not give BH DFW an "F" rating because of a faulty product or bad service.²⁴⁰ It gave BH DFW an "F" rating for failing to prove that it was indeed the "World's Largest!" swimming pool company.²⁴¹ Was there legitimate public concern about this claim by BH DFW? Apparently not, since the company had used the advertisement for years and no one had ever disputed the claim.²⁴²

This case perfectly illustrates the problem with the definition of matter of public concern: an issue can become a matter of public concern in a statutory sense without it ever being a matter of public concern in reality.²⁴³ This case does not represent a misapplication of the law on the part of the Dallas Court of Appeals. It provides a sound, thorough analysis of the TCPA that is on point, especially considering the legislature's instructions to construe the statute broadly.²⁴⁴ If this provision of the statute remains unchanged, Texas courts will have to continue applying the TCPA to situations that may not be legitimate public concerns.

234. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (West Supp. 2014).

235. See *BH DFW*, 402 S.W.3d at 308 (emphasis added).

236. See *supra* text accompanying note 232.

237. See TEX. CIV. PRAC. & REM. CODE § 27.001(7).

238. See *id.*

239. See *BH DFW*, 402 S.W.3d at 302–04.

240. See *id.* at 303–04.

241. *Id.*

242. See *id.* at 303.

243. See text accompanying notes 238–40.

244. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.011(b) (West Supp. 2014).

B. Procedural Problems

In addition to the definitional problems addressed above, there are problematic procedural aspects of the TCPA as well. The first procedural problem concerns the mandatory stay in discovery.²⁴⁵ The TCPA requires that, once the defendant has filed a motion to dismiss under the statute, discovery be suspended until the court rules on the motion.²⁴⁶ The statute only allows “specified and limited” discovery before the court’s ruling on the motion.²⁴⁷ Otherwise, the only pieces of evidence the court may consider when ruling on the motion are the pleadings and affidavits from each side.²⁴⁸

The problem that arises is closely related to the clear and specific evidence ambiguity addressed above.²⁴⁹ That is, if there is no chance to obtain information through the discovery process, how is a plaintiff going to be able to prove *anything* by clear and specific evidence?²⁵⁰ Although the defendant is subject to the stay in discovery as well, his burden is significantly lighter.²⁵¹ He must show only by a preponderance of the evidence that the plaintiff’s suit is “based on, relates to, or is in response to” the defendant’s protected constitutional rights under the statute.²⁵² Considering how the statute is to be liberally construed, this burden does not appear to be very difficult for the defendant to meet.²⁵³ Once the defendant shows the suit’s relation to his constitutional rights by a preponderance of the evidence, the burden then shifts to the plaintiff to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.”²⁵⁴ Once again, although we do not know for sure exactly what clear and specific evidence means, it appears to require a significant showing.²⁵⁵ A plaintiff may very well be able to meet this burden, but only through facts that come out through the discovery process.²⁵⁶

The second procedural problem within the TCPA is the mandatory sanctions imposed on the plaintiff if the court grants the defendant’s motion to dismiss.²⁵⁷ The statute dictates that if the court grants the defendant’s

245. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(c) (West Supp. 2014).

246. *Id.*

247. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b) (West Supp. 2014).

248. *Id.* § 27.006(a).

249. See *supra* text accompanying note 195 (explaining that this burden seems higher than the preponderance of evidence burden required at trial).

250. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West Supp. 2014).

251. See *id.* § 27.005(b).

252. *Id.*

253. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.011(b) (West Supp. 2014).

254. TEX. CIV. PRAC. & REM. CODE § 27.005(c).

255. See *id.*

256. See *id.*

257. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(2) (West Supp. 2014).

motion to dismiss, it *shall* award to the defendant “sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.”²⁵⁸ This is problematic because it could very well deter plaintiffs with a legitimate cause of action from seeking a remedy, fearing that they might be subject to sanctions. Additionally, attorneys may become less likely to take on cases of legitimate plaintiffs, fearing that they might be subject to sanctions as well.

VIII. PREDICTIONS

Although the TCPA is still a relatively young statute, it has been a clear victory for media defendants thus far.²⁵⁹ If the TCPA remains as is, it will likely become a safe haven for media defendants for the foreseeable future. The TCPA is similar to California’s anti-SLAPP statute in that both statutes offer protection for the exercise of free speech rights.²⁶⁰ Additionally, both statutes set a fairly low bar for what qualifies as an important issue deserving of statutory protection.²⁶¹ The California statute has been a huge victory for media defendants, providing an almost impenetrable shield against tort liability.²⁶² Judging from the similarities between the two statutes in terms of breadth, it is likely that Texas media defendants will be afforded a similar high level of protection.²⁶³ In their article *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Mark Walker and David Mirazo point out that media organizations were the biggest supporters of the TCPA before its passage.²⁶⁴ Representative Todd Hunter of Corpus Christi, the lead author of the bill, worked closely with an organization called the Freedom of Information Foundation of Texas (FOIFT) while the bill was being constructed.²⁶⁵ The FOIFT receives funding from a wide variety of media outlets.²⁶⁶ Perhaps it is not so surprising, then, that media defendants have had such success in anti-SLAPP cases thus far.

258. *Id.*

259. *See* *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 83 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 691–92 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Avila v. Larrea*, 394 S.W.3d 646, 662 (Tex. App.—Dallas 2012, pet. denied).

260. *See* CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2014); TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West Supp. 2014).

261. *Compare* CAL. CIV. PROC. CODE § 425.16(b)(1) (leaving the term “public issue” undefined), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (West Supp. 2014) (broadly defining what qualifies as a matter of public concern).

262. *See supra* Part III.C.

263. *See* CAL. CIV. PROC. CODE § 425.16(b)(1); TEX. CIV. PRAC. & REM. CODE § 27.001(7).

264. Walker & Mirazo, *supra* note 200, at 7.

265. *Id.*

266. *Id.*

On a larger scale, the statute is likely to deter plaintiffs from bringing tort actions like defamation, libel, and business disparagement. The legislature will undoubtedly accomplish its goal to deter frivolous lawsuits, but it will also deter a number of plaintiffs that may have a legitimate claim from bringing suit as well. As more attorneys become familiar with the statute, they will likely advise potential clients that pursuing a remedy simply is not worth the cost due to the significant hurdles that must be cleared in order to prevail in a lawsuit.

IX. RECOMMENDATIONS

The Texas Legislature can do a number of things that would help to clear up ambiguities contained in the TCPA and would also help curb statutory abuse. First, at the very least, it could define clear and specific evidence.²⁶⁷ This would give Texas courts more guidance on how to effectively evaluate whether the plaintiff meets the necessary evidentiary burden. It would also give attorneys and potential plaintiffs a better understanding of what is required in order to prevail in a lawsuit. An even better solution would be to amend this portion of the statute altogether and replace the clear and specific standard with something that is easier to grasp. The California anti-SLAPP statute requires that, at this particular stage in the process, a plaintiff show a mere probability of prevailing on the claim.²⁶⁸ This concept is relatively simple to understand and requires no definition. It also seems like an easier burden to meet than providing clear and specific evidence.²⁶⁹ Considering the very limited access to evidence a plaintiff has due to the mandatory stay in discovery proceedings, the legislature should adopt California's evidentiary standard or draft something similar. It would simplify the process and give plaintiffs a better opportunity to keep their lawsuits alive with the very limited amount of evidence they have.

Second, the Texas Legislature could also consider making the awarding of sanctions discretionary instead of mandatory.²⁷⁰ As it stands, there seems to be an implicit presumption that any case resulting in early dismissal is automatically frivolous.²⁷¹ This may or may not be the case, depending on the factual circumstances. The courts are in a better position to determine the legitimacy of claims brought before them than is the legislature because each case is unique.²⁷² A blanket rule of mandatory

267. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West Supp. 2014).

268. CAL. CIV. PROC. CODE § 425.16(b)(3).

269. See TEX. CIV. PRAC. & REM. CODE § 27.005(c).

270. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.009 (West Supp. 2014).

271. See *supra* text accompanying note 19.

272. See Segal, *supra* note 25, at 647–53 (discussing the need for courts to broadly or narrowly interpret legislative statutes to determine different cases).

sanctions is inappropriate because it implies that every suit dismissed in the context of anti-SLAPP legislation is brought for improper purposes.

Finally, the Texas Legislature should narrow what qualifies as a matter of public concern under the statute.²⁷³ As it stands now, something may qualify as a matter of public concern in a statutory sense without ever being a matter of public concern in reality.²⁷⁴ Rather than define matter of public concern without considering the context of the situation, the legislature should instruct the courts to make this determination on a case-by-case basis. This can be accomplished by requiring the defendant to provide evidence that his or her exercise of constitutional rights stems from something that the public at large is actually interested in or concerned about.

X. CONCLUSION

The TCPA is far from perfect, but it is a step in the right direction in protecting the constitutional rights of Texas citizens. The statute is young, so it is not surprising that it has its flaws.²⁷⁵ At this point, the TCPA has done more to strengthen the power of media outlets than it has to protect the constitutional rights of individual citizens.²⁷⁶ This does not mean, however, that the TCPA is a lost cause. It has the potential to provide individual citizens with an unprecedented level of protection against the government and other entities that might seek to suppress citizens' exercise of constitutional rights.²⁷⁷ It gives the State of Texas an opportunity to champion the cause of individual liberties and set an example for other states that do not offer the same comprehensive level of constitutional protection for their citizens.²⁷⁸ This can only be achieved, however, when the rights of all Texas citizens are taken into account—not just media defendants and big corporations. While freedom of the press is certainly one of our most revered constitutional rights,²⁷⁹ the State of Texas has a long tradition of providing plaintiffs a means by which they may pursue a legal remedy.²⁸⁰ With a few tweaks here and there,²⁸¹ the legislature can

273. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (West Supp. 2014).

274. See *Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 308 (Tex. App.—Dallas 2013, pet. denied).

275. See *supra* Part VII.

276. See *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 83 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 691–92 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Avila v. Larrea*, 394 S.W.3d 646, 662 (Tex. App.—Dallas 2012, pet. denied).

277. See *supra* text accompanying note 17. The TCPA not only protects the right to petition, but also the rights of free speech and association. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West Supp. 2014).

278. See *supra* Part V.

279. U.S. CONST. amend. I.

280. See TEX. CONST. art. I, § 13.

curb frivolous lawsuits and protect the rights of individual citizens, while also accomplishing another part of the TCPA's stated purpose: to "protect the rights of a person to file meritorious lawsuits for demonstrable injury."²⁸²

281. *See supra* Part IX.

282. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002.